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## THE USED CAR DEALER'S LIABILITY FOR INJURIES RESULTING FROM THE SALE OF DEFECTIVE AUTOMOBILES

Although the cases are not numerous, those reported indicate a trend in the establishment of a responsibility resting on the used car dealer for injuries resulting from the sale of defective automobiles. While an automobile is not *per se* a dangerous instrumentality,<sup>1</sup> if defective or lacking in the necessary safety equipment, it is imminently dangerous,<sup>2</sup> not only to its passengers but also to those who might come in contact with it. Accidents caused by the operation of defective automobiles have necessitated, among other things, the passage of laws on financial responsibility.<sup>3</sup> Although generally the liability for injuries resulting from such accidents is borne by the owner or his insurer, under certain circumstances the dealer of used cars is also found in a position of responsibility. When a defective automobile is sold and the defect is the cause of an accident with resultant injury to either the purchaser or a person not a party to the sale, the dealer may find himself legally liable.

While the used car dealer is not an insurer of the vehicle he sells,<sup>4</sup> the courts have imposed upon him a duty to those who might come in contact with it, whether driver,<sup>5</sup> passenger,<sup>6</sup> or the person<sup>7</sup> or property<sup>8</sup> of others. He is charged with the duty of using reasonable care in detecting those defects which would make the automobile unsafe, and knowledge of their existence is imputed to him.<sup>9</sup> In satisfying his duty he is not required to disassemble the entire machine.<sup>10</sup> He has only to ascertain whether the vehicle is "equipped with the minimum essentials for safe operation."<sup>11</sup> His responsibility would seem to fall between that of the new car dealer and the manufacturer. While he cannot rely upon the care used by the manufacturer as can the new car dealer,<sup>12</sup> (in fact he cannot even rely on the care used by independent contractors who work on reconditioning the car)<sup>13</sup> neither

1. *Standard Oil Co. of Indiana v. Leaverton*, 239 Mo. App. 284, 288, 192 S.W.2d 681, 683 (1946); *Vaughn v. Millington Motor Co.*, 160 Tenn. 197, 201, 22 S.W.2d 226, 227 (1929); *Flies v. Fox Bros. Buick Co.*, 196 Wisc. 196, 218 N.W. 855, 859 (1928).

2. *Barni v. Kutner*, 76 A.2d 801, 805 (Del. 1950); *Flies v. Fox Bros. Buick Co.*, *supra* note 1.

3. See Comment, 4 *MIAMI L. Q.* 502 (1950).

4. *Egan Chevrolet Co. v. Bruner*, 102 F.2d 373, 375 (8th Cir. 1939); *Curby v. Masterbrook*, 288 Mich. 676, 286 N.W. 123, 126 (1939).

5. *Barni v. Kutner*, *supra* note 2; *Boos v. Claude*, 69 S.D. 254, 9 N.W.2d 262 (1943).

6. *Holt v. Eastern Motor Co.*, 65 Ga. App. 502, 15 S.E.2d 895 (1941); *Bock v. Truck and Tractor Inc.*, 18 Wash.2d 458, 139 P.2d 706 (1943).

7. *Flies v. Fox Bros. Buick Co.*, *supra* note 1.

8. *Standard Oil Co. of Indiana v. Leaverton*, *supra* note 1.

9. *Egan Chevrolet Co. v. Bruner*, *supra* note 4.

10. *Ibid.*

11. *Id.* at 376.

12. *Shroder v. Barron-Dady Motor Co.*, 111 S.W.2d 66 (Mo. 1937); *Morressy v. Mazzio*, 249 App. Div. 788, 292 N.Y. Supp. 455 (2d Dep't 1936).

13. *McGuire v. Hartford Buick Co.*, 131 Conn. 417, 40 A.2d 269 (1944) (tires replaced by independent tire company before sale by dealer; wheel fell off after sale).

need he examine every part as must a manufacturer.<sup>14</sup> When reduced to individual cases and particular defects the reasonableness of the imposition of such a duty is apparent. While this would seem to define and thus limit his duty, in fact, just how far need he go in determining the safe condition of his stock in trade?

The dealer is not required to furnish additional safety equipment that is not standard on the model when sold new.<sup>15</sup> When the defect is one known to him, he is in a position to escape liability if he will inform the purchaser of it.<sup>16</sup> However, this does not hold true if the dealer knows or has reason to believe that the car will not be made reasonably safe before being operated,<sup>17</sup> in which case his negligence would be comparable to turning a car over to a person known to be unfit to drive it.<sup>18</sup> As it is hardly likely that the average dealer will advertise or represent his stock as being defective and unsafe, this method of avoiding liability is seldom employed.

The majority of accidents involving defective used cars results from two causes: inability to stop<sup>19</sup> and inability to steer.<sup>20</sup> The more serious and thus more hotly contested actions are based on accidents caused by these defects. While patent and discoverable,<sup>21</sup> they require a more thorough examination and testing to discover than those which are more obvious, such as faulty tires,<sup>22</sup> broken springs,<sup>23</sup> escaping gas fumes<sup>24</sup> and loose wheels.<sup>25</sup>

Although the reported cases do not discuss the matter, a cursory examination will reveal that the time between sale and accident is an important factor in connecting the dealer with the accident. As the defect must be one of which the dealer has knowledge or of which he is charged with knowledge,<sup>26</sup> in order to hold him responsible it should manifest itself shortly after the sale is made.<sup>27</sup> Otherwise it would appear that the defect was

14. See note 10 *supra*. But see *Flies v. Fox Bros. Buick Co.*, *supra* note 1 at 200, 218 N.W. 855, 860, where a second hand car dealer's duty is said to be the same as that of a manufacturer.

15. *Wilson, Jurich General Accident and Liability Ins. Co., Interveners v. National Casualty Co.*, 191 So. 574 (La. 1939).

16. *Trust Co. of Chicago v. Lewis Auto Sales*, 306 Ill. App. 132, 28 N.E.2d 300 (1940); *Bergstresser v. Van Hov*, 142 Kan. 88, 45 P.2d 855 (1935); *RESTATEMENT, TORTS* § 388 (1938).

17. *Bergstresser v. Van Hov*, *supra* note 16 at 92, 45 P.2d at 857; *RESTATEMENT, TORTS* § 389 (1938).

18. *Bergstresser v. Van Hov*, *supra* note 16 at 92, 45 P.2d at 857.

19. *Barni v. Kutner*, *supra* note 2, *Standard Oil Co. of Indiana v. Leaverton*, *supra* note 1; *Boos v. Claude*, *supra* note 5; *Flies v. Fox Bros. Buick Co.*, *supra* note 1.

20. *Egan Chevrolet Co. v. Bruner*, *supra* note 4; *Supera v. Mooreland States Corp.*, 13 Cal. App.2d 186, 56 P.2d 595 (1936); *Holt v. Eastern Motor Co.*, *supra* note 6; *Wells v. Oldsmobile Co. of Oregon*, 147 Ore. 687, 35 P.2d 232 (1934).

21. See cases cited in notes 19 and 20 *supra*.

22. *McLeod v. Holt Motor Co.*, 208 Minn. 473, 294 N.W. 479 (1940).

23. *Bock v. Truck and Tractor Inc.*, *supra* note 6.

24. *Banker v. Packard Motor Car Co. of Chicago*, 297 Ill. App. 645, 17 N.E.2d 987 (1938).

25. *McGuire v. Hartford Buick Co.*, *supra* note 13.

26. See note 9 *supra*.

27. See *Egan Chevrolet Co. v. Bruner*, *supra* note 4 (one day); *Barni v. Kutner*, *supra* note 1 (two hours); *McGuire v. Hartford Buick Co.*, *supra* note 13 (three days); *Flies v. Fox Bros. Buick Co.*, *supra* note 1 (three blocks from garage). But see *Bock v.*

either latent when the sale was made or that it developed subsequent thereto. This is only reasonable since the dealer is not an insurer<sup>28</sup> and the owner is under a duty to maintain his automobile in a safe condition.<sup>29</sup>

Recovery is generally sought under one of two theories: negligence or warranty.<sup>30</sup> The action under the theory of negligence is open to both the purchaser and persons not parties to the sale, lack of privity of contract being no defense to an action by a third person.<sup>31</sup> While the intervening negligence of the purchaser may be used as a defense by the dealer to an action by the purchaser,<sup>32</sup> it is not available when the plaintiff is a third person.<sup>33</sup>

Whether the automobile is being operated for demonstration purposes<sup>34</sup> or subsequent to the sale,<sup>35</sup> the liability of the dealer remains the same, being based on the fact that he permits, whether by sale or in anticipation of a sale, a defective automobile to be operated upon the public streets.<sup>36</sup>

A warranty, being an integral part of a contract and its validity depending on consideration, is made for the benefit and protection of the purchaser<sup>37</sup> and an action thereon is restricted to those in privity with the seller.<sup>38</sup> With the action under the theory of negligence open to those not parties to the sale it is difficult to imagine an attempted recovery by such persons on the theory of breach of warranty. However, such attempts have been made with the obvious result of defeat by reason of lack of privity.<sup>39</sup> Although it has been held that the principle of implied warranty does not apply to second hand machinery,<sup>40</sup> the rule is abrogated when a used car is represented as being in a safe condition and the purchase is made in reliance thereon.<sup>41</sup>

Truck and Tractor Inc., *supra* note 6, 139 P.2d 706, 714, where the court said that the mere possession by the purchaser for twenty-five days does not necessarily break the chain of cause and effect.

28. See note 4 *supra*.

29. *Dostie v. Lewiston Crushed Stone Co.*, 136 Me. 284, 8 A.2d 393 (1939); *Delair v. McAdoo*, 324 Pa. 392, 188 Atl. 181 (1936).

30. While the action based on fraud is available, still, it requires proof that the dealer had knowledge of the defect and is therefore seldom used. *Barni v. Kutner*, *supra* note 2.

31. *Barni v. Kutner*, *supra* note 2; *Bock v. Truck and Tractor Inc.*, *supra* note 6; *Flies v. Fox Buick Co.*, *supra* note 1.

32. *Flies v. Fox Bros. Buick Co.*, *supra* note 1.

33. *Holt v. Eastern Motor Co.*, *supra* note 6; *Flies v. Fox Bros. Buick Co.*, *supra* note 1; *RESTATEMENT, TORTS* § 490 (1938). *Contra*: *West v. Wall*, 191 Ark. 856, 88 S.W.2d 63 (1935).

34. *Holt v. Eastern Motor Co.*, *supra* note 6; *Standard Oil Co. of Indiana v. Leaverton*, *supra* note 1.

35. *Egan Chevrolet Co. v. Bruner*, *supra* note 4; *Barni v. Kutner*, *supra* note 2.

36. *Egan Chevrolet Co. v. Bruner*, *supra* note 4; *Standard Oil Co. of Indiana v. Leaverton*, *supra* note 1.

37. *Barni v. Kutner*, *supra* note 2.

38. *Ibid.*

39. *Ibid.*

40. *Bayer v. Winston Motor Car Co.*, 194 Mich. 222, 160 N.W. 642 (1916); *WILLISTON, SALES* § 232 (Rev. Ed. 1948).

41. *Curby v. Mastenbrook*, 288 Mich. 676, 286 N.W. 123 (1939).

"Puffing," while harmless in other situations,<sup>42</sup> when applied to used cars is a distinct representation and may be the basis for an action on the theory of warranty.<sup>43</sup> The dealer assumes the risk whenever he makes a representation, whether<sup>44</sup> or not<sup>45</sup> the actual condition of the car is known to him.

It is apparent that while the used car dealer is burdened with a duty, it is reasonable and relatively easy to satisfy. A reasonable examination to detect patent defects, with particular attention given to the brakes and steering mechanism, followed either by the making of necessary repairs or informing the prospective purchaser of the defects will suffice to relieve him of liability.

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42. *Berwash v. Ballou*, 356 Ill. 34, 82 N.E. 355 (1907); *Stovall v. Newell*, 158 Ore. 206, 75 P.2d 346 (1938).

43. *Curby v. Mastenbrook*, *supra* note 41; *Boos v. Claude*, *supra* note 5. *Contra*: *Terrill v. Florence*, 53 Ga. App. 345, 185 S.E. 839 (1936) (a dealer's representation was said to be merely a statement of opinion).

44. See note 30 *supra*.

45. *Curby v. Mastenbrook*, *supra* note 41.